The discussion evoked by this subject, since it turns on the fundamental nature of consideration, has been widespread. It has been vigorously contended that any detriment in fact should constitute consideration, and that such is here found, both in the performance and in the promise to perform. 12 HARV. L. REV. 515, *et seq.* Sir Frederick Pollock rejects this view with slight argument on the ground that detriment in contemplation of law, as distinguished from detriment in fact, has always been regarded as the test of consideration. He contends that as the cases here under discussion are extremely infrequent, the settled principles of contracts should be rigidly applied to them. It must be admitted that detriment in contemplation of law has been the phrase generally used by the courts, and yet, in endeavoring to do justice, they have often gone far beyond this test in their decisions. *Abbott* v. *Doane*, 163 Mass. 433. To the results we should look for the law, rather than to phrases which we have inherited from the past. Again, while cases involving the point here under discussion have been infrequent, cases where the previously existing obligation ran between the same parties who attempted to make the new contract have been frequent, and as the two classes of cases are so analogous, the decisions in one class must have a vital practical influence on the decisions in the other. In consequence this discussion ought not to be purely academic. Furthermore we should remember that the doctrine of consideration, after centuries of development and uncertainty, has only recently begun to assume rigid limitations. Under these circumstances there seems no sufficient reason for refusing to satisfy a business sense of justice by recognizing detriment in fact as the test of consideration.

VESTED INTEREST OF A BENEFICIARY UNDER A POLICY OF LIFE INSURANCE. — The nature and the extent of the rights of the beneficiary under a policy of insurance are problems which have given rise to much conflict of authority. In cases where the beneficiary takes out the policy and pays the premiums, or where the insured is under a legal obligation to the beneficiary to procure and to maintain the policy, it is very properly held that the insured cannot by any act destroy the interest of the beneficiary. But courts almost universally go further, and hold that in all cases, unless express provision to the contrary is made, whether the above conditions are present or not, the beneficiary has the same right. *Central Bank* v. *Hume*, 128 U. S. 195; but see, *contra*, *Clark* v. *Durand*, 12 Wis. 223. The conflict of authority as to the extent of the right is so general that it seems impossible to bring the decisions into harmony with any legal principle. A recent writer, however, has undertaken to define the so-called "vested interest" of the beneficiary and to formulate the legal principle upon which it rests. *Vested Interest of Beneficiary under a Policy of Life Insurance*, by Alexander H. Robbins. 53 Central L. J. 184 (Sept. 6, 1901). The author finds the origin of the doctrine in the pecuniary interest which the beneficiary usually has in the life of the insured, and contends that the contract is "in the nature of an irrevocable trust." He further points out that the word "vested" means only that the beneficiary has an absolute, irrevocable right to the proceeds of the policy upon the happening of all the contingencies and the fulfilment of all the conditions. Important results follow from this limitation. The beneficiary's right is thus made contingent, and the sole present right is to prevent the insured from impairing the future right to take the proceeds.

Mr. Robbins's contention that the doctrine reaches just results and works out the intention of the parties is entirely warranted. But the principles by means of which he arrives at his conclusions seem questionable. The language of trusts, frequently employed by courts and by writers, seems to have no application. The insured never had any intention of making himself a trustee; on the other hand, the obligor cannot be a trustee, since there is in his hands no *res* to be kept apart for the benefit of the *cestui*.

The theory of contracts that the sole beneficiary may sue directly in his own name seems to offer a fair solution. If that general principle be once accepted,

it follows that immediately upon the issuing of the policy the beneficiary has, irrespective of the intentions of the parties, a vested chose in action, which the insured cannot legally destroy by revocation, surrender, assignment, or attempted change of beneficiary. The promise, however, of the insurer is not to pay absolutely to the beneficiary. It is in reality to pay the beneficiary if living at the death of the insured, and, if not, then to pay the insured or any person he may designate. If these conditions are not expressly stated yet it is submitted that according to the clear intention of the parties this is the fair meaning of the words. Whether the desirable results reached by Mr. Robbins may be attained on sound principle at all is open to doubt, but it is submitted that the doctrines of contract offer the fairest ground upon which to base them.

IMPOSSIBILITY OF PERFORMING CONTRACTS AS A DEFENSE. — Impossibility of performance constituted no excuse in the early law for a breach of contract. To this rule three exceptions are now universally admitted. When performance is prevented by a change of law, by the death of one of the parties to a contract for personal service, or by the destruction of the subject matter of the contract, the breach is excused. See 15 HARV. L. REV. 63. These exceptions have been recognized on the ground that the parties impliedly agreed that such contingencies, and such only, should terminate the obligation. There are two objections to accepting this view as final. In the first place the parties generally have performance of the contract alone in mind, and therefore to say that performance was thus conditioned, is pure fiction. See 12 HARV. L. REV. 501. In the second place a number of American courts, rightly feeling that justice would thereby be furthered, have recognized as excuses contingencies which clearly are not covered by these exceptions. *Buffalo, etc., Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247; *Lovering* v. *Buck Mountain Co.*, 54 Pa. St. 291. Discontented with these old arbitrary exceptions, the courts have been groping for a more liberal rule.

Such a rule has been suggested in a recent article. *Impossibility of Performance as an Excuse for Breach of Contract*, by Frederick C. Woodward. 1 Colum. L. Rev. 529 (Dec., 1901). "If the contingency," Mr. Woodward says, "which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression, failure of performance should be excused." The proper inquiry is "Would the parties, had their attention been called to the contingency, have thought it unnecessary to provide for it in the contract? That is not altering or adding to the contract, but merely construing it as already made by the parties." This does not mean that performance is excused by force of an implied condition, which, as above stated, would be purely fictitious. The writer's meaning seems to be that as the plan of the parties may be presumed to have been to make a just contract, and as in justice certain contingencies ought to terminate the obligation, the words by which the parties bind themselves, although apparently absolute in form, may be construed to mean merely that the parties are bound, provided no such contingencies occur. The suggestion is certainly ingenious, but is in truth open to the same objection as the rule of implied conditions. Had the parties carefully considered all the possible contingencies, they would doubtless have agreed that such a contract was just, but their minds were concerned only with the making of a contract which they regarded as certain of performance, and they therefore used words which clearly imposed an absolute obligation, and which have always been regarded in that light at law. To construe them otherwise would be a clear violation of the meaning of words.

The truth of the matter is that the courts of law, recognizing the injustice of enforcing under all circumstances an absolute legal obligation, have interposed in certain cases what must be regarded as an equitable defense. Such a recognition of equitable principles at law is not unprecedented. Thus, a fraudulent vendee, who is in the position of a constructive trustee, has been held liable to